7-03 MO Essay 1 - Example 1

Question 1

Charlotte is entitled to the bank account.

This account is a "Totten Trust." A Totten Trust is a bank account that the settlor opens, with the name on the account reading, "settlor, trustee for beneficiary." Here, Agatha properly opened a Totten Trust for Bertha, by opening the account with the intent to benefit Bertha - no further trust agreement was required. However, a Totten Trust is revocable at any time during the settlor's lifetime. The intent to revoke may be evidenced by the settlor's actions, such as numerous withdrawals with intent to revoke (though withdrawals alone are insufficient evidence of revocation). Here, however, Agatha's intent was clear through the devise to Charlotte in her will. This effectively revoked the Totten Trust and the $10,000 in the bank account passed to Charlotte.

Question 2

Yes, but Terry must go to court to get permission to sell the warehouse.

This case is an example of a deviation from trust terms because of changed circumstances. The leading case in the area (nationally) is the Pulitizer case, in which the owner of the New York World created a trust that provided that the stock of the newspaper was never to be sold. When the value of New York World Stock declined, however, the trustee found himself bound by the terms of the trust. The court, however, allowed the doctrine of changed circumstances to apply so that the trustee could sell the stock for the benefit of the beneficiaries.

Many states require a high showing to permit deviation from a trust's terms, such as are the consent of all adult beneficiaries and a finding that no unborn, minor, or unascertainable beneficiaries will be harmed. In Missouri, however, the court will allow deviation if it is "expedient", meaning helpful or useful.

In this case, Terry should petition the court under this doctrine. Considering the severity of the depreciation and the general prohibitory language of the trust (because the court might find that the settlor was not as concerned with this particular real estate), the court should allow Terry to deviate from the trust's terms.

Question 3

Tina has created an honorary trust for the care of her cat. An honorary trust is a kind of hybrid – it is not exactly a charitable trust, because the beneficiaries are ascertainable and few, and it is not a private trust, because it is not for the benefit of a human being. However, an honorary trust is valid by statute in Missouri.

Tom is, in effect, on his honor when it comes to Tina's wishes. Her wishes will be policed by the residuary beneficiary (or Tina's heirs), who will ensure that Tom cares for the cat. If Tom does not comply with the terms of the trust, a resulting trust is held by him for the residuary beneficiary. However, the residuary beneficiary will then hold the $100,000 free from any responsibility to care for Hairball.

Finally, even if Tom does abide by the terms of the honorary trust, the rule against perpetuities applies to the trust. In Missouri, an honorary trust is valid by statute for 21 years only. After that time, Tom will hold the trust free and clear of any responsibility for Hairball.

7-03 MO Essay 1 - Example 2

I. Charlotte is entitled to the money in the savings account. At issue here is the validity of a Totten trust, one created by the depositor at a financial institution. Even without a trust agreement, Totten Trusts are valid in MO. Agatha's creation of the trust was valid as to Bertha at the time of creation. The fact that she made withdrawals from the account herself does not change this. Regardless of that fact, in MO, a Totten trust can be revoked by will, if specifically mentioned in the will. In this case, Agatha specifically mentioned the savings account, and stated its identity sufficiently, therefore, even if a valid Totten trust existed, it was revoked in favor of Charlotte by Agatha's will. Charlotte will get the money in the bank account.

II. Terry can sell the warehouse. Terry must get permission from the court to sell the warehouse, since it violates an express condition of the trust. Terry could also sell the warehouse if all beneficiaries consent to the violation, because they would be estopped from raising the breach because of their participation. Also, if Terry acts under the control and supervision of the Testator, his actions will not be actionable.

In some states, a trustee will only be allowed to sell property expressly prohibited from being sold upon a showing that the property is no longer serving the purpose of the trust, to make money.

In MO, courts will allow a trustee to dispose of property even if the trust agreement specifically prohibits doing so, if it is expedient, meaning generally that it would be a wise business decision. In this case, the warehouse would be expensive to repair the structure and it's difficult to rent the structure. The facts would lead a MO court to approve the sale of the warehouse, as its sale would be a wiser investment strategy than would its retention. Terry will be able to sell the warehouse.

III. Tom will be obligated to take care of hairball. Tina has created a valid honorary trust, which is valid in MO.

At common law, this trust would be found to be violative of the rule against perpetuities, but MO has a statutory provision, which validates honorary trusts for 21 years. If Tom fails to care for hairball as instructed by the will, Tom may be sued by one with standing, the trust will be terminated, and the money will pass through the residuary clause of the will.

The fact that a valid trust was created, its terms were set out in the will, Tom has a definite duty as to what to do with the money, and the fact that MO has a statute validating honorary trusts for 21 years will lead to Tom having to care for hairball for 21 years using the trust money. At the end of the trust period, a resulting trust will return the money to Tina's estate and it will pass to her heirs.

7-03 MO Essay 1 - Example 3

I. Charlotte is entitled to the money in the savings account. The account is a Trotten Trust. A Trotten Trust is valid in Missouri and exists, as here where one party opens a checking account in her name as trustee for another. The opener of the account may use the account, including deposits and withdrawals during life, and the account typically goes to the beneficiary named in the account, Bertha in this case, at the death of the trustee, Agatha. However, in Missouri the beneficiary of a trotten trust may be changed by specific reference in the will of the trustee. Here, Agatha (trustee) specifically changed the beneficiary of the account in her will to Charlotte; and, therefore, Charlotte is entitled to the money.

II. Terry can sell the warehouse only with the permission of the court due to changed circumstances. Normally, the trustee cannot do anything expressly prohibited by the trust agreement. However, in Missouri, a court may allow the trustee to deviate from ministerial or administrative terms of the private trust if it is expedient, or useful. Due to the changed circumstances here, making the rental property more useful and beneficial to the trust if it were sold, the court would be likely to allow the trustee to sell the property, despite the provision forbidding the sale of property.

It should be noted, that absent such an express statement of "no sale of property" a trustee has the power to sell property as it may be in the best interest of the trust, just as a fee simple owner would have that power over his property.

III. The provision in Tina's will creates an honorary trust which obligates Tom to use the money for the benefit and care of "hairball." The trust obligations will be enforced by the residuary beneficiaries of the will. The terms of an honorary trust in Missouri are deemed to be valid for no longer than 21 years (to avoid a problem with the Rule Against Perpetuities) and therefore Tom is obligated to care for the cat until the cat dies or for 21 years, whichever time period is completed first.

An honorary trust is not a true trust because it does not have human, ascertainable beneficiaries (as is required for a true trust). However, if the other trust requirements are met, the trustee delivers trust property to a trustee to be used to benefit the beneficiary with intent to create a trust for a valid purpose, Missouri will recognize an honorary trust for the care of animals or memorials/grave sites. Because an honorary trust does not have human beneficiaries who have the capacity to enforce the trust and bring action if the trustee violates any duties imposed by the trust, Missouri deems the residuary beneficiaries, who would take in the event the trust fails, as the persons who will be able to bring suit for violations of the obligations under the trust.

Here, Tina created a valid honorary trust for the care of Hairball. Tom is the named Trustee and has an obligation to use the trust property for the benefit of hairball for the duration of the life of the cat or for 21 years at the longest. The residuary beneficiaries may enforce the trust obligations.

7-03 MO Essay 2 - Example 1

(1)

Once a will has been admitted to probate, persons wishing to contest it must do so within 30 days. A person wishing to contest must first have standing -- which is defined as those who would receive a gain if the will were declared invalid. In this case, the new will leaves Joe's children nothing and the old will leaves them everything, so they all have standing to challenge this new will. Joe's children should file a petition in the probate court where the will was admitted, stating their challenge to the validity and the grounds for such a challenge. This petition should be accompanied by affidavits or other evidence to support it.

(2)

The two strongest legal theories to be used as grounds to contest the new will would be: (1) testator lacked mental capacity; and (2) the new will was the product of undue influence. Either one, if proven, will invalidate the will and it will not be admitted to probate and therefore Joe's children can offer the old will for probate.

At issue is whether or not there is grounds to contest the new will. Part of the validity of a will requires the testator to have sufficient mental capacity at the time of its execution. The elements are that: (a) testator know the nature of the act (that he is making a will); (b) testator understand the nature & extent of his property; (c) testator know the natural objects of his bounty; and (d) testator understand the dispositions he is making in the will. Simply because a testator is elderly, ill, a drug-addict, etc., will not be sufficient reason alone to declare incapacity. There must be a sufficient finding that at the time the will was executed, testator did not have the capacity to understand the four elements listed above.

The second theory is undue influence. This is when someone receiving a benefit of the will: (a) had opportunity to exert her influence over the testator and *did* exert such influence; (b) the influence was such that it overcame the mind and free will of the testator; and (c) the will was therefore a product of such influence and would not have been created "but for" such undue influence. Additionally, there is also undue influence that is shown through a confidential relationship. The elements are that if the testator and a person receiving a benefit under the will are (a) in a confidential relationship (such as husband-wife, lawyer-client, etc.); (b) the fiduciary of the testator (wife) is active in procuring or drawing up the will; and (c) receives a benefit from

the will -- there is a presumption of undue influence in making the will.

(3)

The issue is what are the burdens of proof for proving either insufficient mental capacity of the testator or undue influence.

Initially, when a will is petitioned for probate, the testimony of the 2 attesting witnesses must be given to prove the elemetns of a valid execution. However, when a will is self-proving, it will be presumed to have been validly executed and therefore such testimony is not necessary. The proponents of the will have no burden to further prove testator's mental capacity. Therefore, in this case, the will was self-proving, so Jane's children have met their burden of proof. The burden of proof will then shift to Joe's children to prove that Joe did not have sufficient mental capacity at the time of the execution of the new will to make it valid.

The burden of proving undue influence existed in executing a will must be met by the contestants of the will (Joe's children). However, if a confidential relationship is shown, a presumption of undue influence is created and shifts the burden of proof to the proponents of the will (Jane's children) to prove that there was no undue influence used in executing the new will.

(4)

The issue is what facts support the contest theories of insufficient mental capacity and undue influence.

Insufficient mental capacity: In this case, Joe was declared to have dementia as well as Parkinson's. However, this alone is not sufficient to prove mental incapacity. However, he often became confused about who his children (object of his bounty) were when they came to visit, and often called Jane by his first wife's name. He also no longer took care of his financial assets, so he may not have known the extent of his property. Due to his dementia, he may have forgotten that he had already made a will. Often, his memory and reasoning abilities were declared to be below sufficient by treating physicians. Joe's children will argue that his treating physician said the dementia would grow worse and was untreatable. On the other hand, Jane's children will argue that he often was very lucid and only needs to have had capacity at the time of execution for the will to be valid. Here, a week before the new will was executed, a treating doctor noted

that Joe was oriented as to person, place and time.

Undue influence: The BOP is on Joe's children to prove that there was undue influence. However, if they can prove a confidential relationship, the presumption of undue influence is created and the BOP shifts to Jane's children to prove it was not a product of undue influence. In this case, Joe and Jane were married. This is enough to create a confidential relationship. Jane was active in procuring Joe to create the new will -- she suggested that he make a new one even over his protests. She made an appointment with *her* lawyer and was present for the intial consultation and drawing up the will. She also received an indirect benefit from the will because her children were left everything of Joe's and his children were left nothing. This is enough evidence to create a presumption of undue influence through a confidential relationship. However, Jane's children will argue that she did not force him against her will. She did not make an appointment with her lawyer until he agreed -- and she had taken care of him day & night for 3 years. There was nothing she made him do -- he agreed to it all -- she only suggested things. However, Joe's children will argue that she guilted him into agreeing and that he did not consent voluntarily -- he just did not want to be put in a nursing home. She knew her children were hurting financially and really could use some more inheritance money. He also never got the chance to consult with his own lawyer or with her lawyer in private, without her intimidating presence.

It will be up to the court to decide who is most convincing -- but my opinion is that the new will should be found invalid because it is the product of undue influence through a confidential relationship (which is the stronger argument than the insufficient mental incapacity). All the elements of such a relationship are met and there is such a contrast to the old will and there are not many obvious reasons for such a drastic change (even though a testator is free to disinherit his children as he pleases) except for such undue influence exerted by Jane.

7-03 MO Essay 2 - Example 2

I) To contest the "new" Will that was admitted to probate, they must bring an action contesting the Will in the probate court no longer than 6 months after the grant of letters was issued by the probate court. In the, present case, it appears as though Joe's children are still within the 6 month window, so as long as they bring an action to contest the Will in the court that admitted the will into probate they should be able to contest it.

II) Joe's children should seek to contest the will on the grounds of 1)Lack of Testamentary capacity, 2) Undue Influence, & 3) possibly Fraud.

The elements for lack of Testamentary Capacity are as follows:

1) Testator did not know the Nature and Extent of his property.
2) Testator did not know the Natural Objects of his Bounty.
3) Testator did not know the Disposition he made in the Will.
4) Testator did not make reference to the ordinary affairs of life.

*NOTE = if any 1 of the above exists then the Testor will be deemed to lack Testamentary Capacity.

The elements for Undue Influence can be divided into 2 categories.

The 1st gives rise to a presumption of undue influence:

1)Testator made a substantial bequest to the undue influencer,
2) The Undue Influencer had a Confidential or Fiduciary relationship with the Testator, and
3) The Undue Influencer was active in procuring the change in the Will that led to the bequest.

The 2nd are elements that need to be proved if you can't establish the presumption of undue influence. 1) The undue influencer to steps (actively) to influence the Testator,
2) The undue influencer over took the mind & free will of the Testor,
3) But for the undue influencer's actions the Testator would not have changed his Will.

The elements of Fraud are as follows:

1) There was a misrepresentation
2) Of a material fact
3) That caused the Testator to change his Will.

III) The Burden of proof for Testamentary capacity lies with the proponent of the will. In this case, Jane's children will have to show that all 4 of the elements for Testamentary Capacity have been met to establish a prima facie case for Testamentary Capacity. If they establish the prima facie case the the burden switches to Joe's children to show that 1 of the 4 elements does not exist.

The burden of Proof for Undue influence lies with the contestants of the will. As previously stated, the contestant can either prove that there is a presumption of undue influence or prove that there was undue influence. The burden is on Joe's kids in this case because they are the contestants.

The burden of Proof for fraud is on the contestant. As previously stated, Joe's children are the contestants so they will have the burden of proving fraud.

IV. For Undue influence, the contestants will be unable to gain the presumption of undue influence, b/c the undue influencer in this case, Jane, was not the person the substantial bequest was made to. Rather, the bequest was made to Jane's children. However, the facts do indicate that there was undue influence that caused the change in the will. First, Jane did take steps to get Joe to change his will. She continually badgered Joe to change it until he finally relented after several weeks. She drove Joe to his lawyer & sat in while the decision to change was made. Second, she overtook Joe's free will (which wasn't hard to do since he had dimentia) by continually badgering him to change the will, including during those times when the dimentia had taken ahold of Joe. Third, the facts seem to indicate that it was Jane's, not Joe's, idea to change his will & she took steps (mentioned above) to get him to change it. Thus, "But for" Janes badgering the will would have never been changed.

There are many facts that support the theory that Joe lacked testamentary capacity. First, it appears as though the dimentia cause Joe to lack the requisite knowledge of the Natural objects of his bounty. The facts state that Joe didn't even recognize his kids at times. Furthermore the fact that Joe wasn't always oriented as to the place & time indicates that he wasn't aware of the ordinary affairs of life. However, the facts do indicate that Joe was aware (oriented) as to the person, place, & time when he signed the Will.

There are not many facts that strongly support the theory fo Fraud. Namely, there is not 1 fact that indicates Jane made a material misrepresentation. Thus, this theory is clearly the weakest & most unlikely to succeed.

7-03 MO Essay 2 - Example 3

1. To challenge the validity of a will that has admitted to Probate, the plaintiff must file a petition in the Circuit Court where there is venue. Here, the plaintiff would have venue in the county where the will has been admitted to Probate & is the most likely place to bring suit. Plaintiff also must show they have standing to bring suit, which they do. In a will contest, a plaintiff has standing to challenge if he/she can show he would get more if the challenged will were invalidated by the Court. Here, kids take nothing under challenged will but get all Dad's property under the old will. Because they stand to gain (old will would be the valid will if newer one is thrown out), they have standing. Plaintiff only has 6 months to file the case from the date it was offered to Probate.

Quest. #2,3,4

The two best theories are probably that Testator lacked testamentary Capacity, & that he was a victim of Undue Influence.

The parties offering the will to Probate have the burden of proof to show that Testator had testamentary capacity. They would need to show that Testator (Joe) (testator = person who creates a will) had 4 things:

1. that testator knew what he was doing, that is, knew the act he was doing was making a will to transfer property @ his death.
2. that the Testator knew what property he had
3. that the Testator knew who the Natural objects of his Bounty were (i.e., his kids)
4. that the Testator (hereinafter "T") knew the disposition & understood the disposition that he was making.

Plaintiff has a good case for lack of testamentary capacity, b/c facts tell that Joe (T) didn't always recognize his own kids & called them by wrong names. The facts don't tell what property Joe had, so hard to tell if he knew what property he had. The issue of whether he knew that he was making a will could go either way; the plaintiff can always point to the Psychiatrist's Notations about the advancing Dementia & also use that psychiatrist's notes as evidence Joe didn't understand the Disposition. Overall, though, I think that the will can be probated b/c the proponents will use evidence of Joe's Doctor ("Joe's in good health") & that Joe seemed to be OK sometimes. Thus, the proponents will say Joe executed will during a "Lucid Interval", that is, a time when Joe did have testamentary capacity; the facts tell that his disease allowed for such times.

If proponents are able to prove Testamentary Capacity, then the plaintiff in the Will Contest will want to assert Undue Influence. MO allows for a presumption of Undue Influence if the Testator was in a fiduciary Relationship w/someone, he was susceptible to Undue Influence, & a will results where the "influencer" is a will Beneficiary. Here, the "influencer" was Jane but she did not become a Will Beneficiary; however, Ct will likely allow the plaintiff to prove the elements of the presumption & substitute "her kids" for Jane as Beneficiary. The will gives an unnatural Disposition where the original Beneficiaries are completely gone; the will of the "influencer" has been substituted for Joe's. Here, Jane = Fiduciary, b/c had Durable Power of Atty & for all purposes, so could pay Bills, etc.

He was obviously susceptible to influence, even though old age & frailty alone don't mean U.I. has occurred.
Facts supporting plaintiff (even if the "Presumption" isn't applied):

– She wanted him to make will
– Her atty, not his
– She made apptmt
– She drove him
– She was in conference w/Atty
– She told lawyer what Joe wanted
– Joe only acquiesced in this

*Plaintiff will very likely win a case on Undue Influence.

7-03 MO Essay 3 - Example 1

1. Al and Clara must include their affirmative defense of statute of limitations. At issue is the contents of an answer to preserve arguments in a case. In general, an answer may contain as many as 4 parts: admissions/denials, affirmative defenses, counterclaims, and prayer for relief that the defendant requests. IN this case, both Al's and Clara's answers contained the denials (though it is not clear from the question whether they denied each separate paragraph of Bob's complaint, or generally denied the entire complaint in one sentence. Generally, denials must correspond to each separate paragraph, thus, AL and Clara would need to deny each separate paragraph individually, not as one general denial). Al and Clara also have an argument that the statute of limitations has run for Bob's trespass action. This is an affirmative defense, because if proven, it would bar Bob's claim regardless of whether Bob's allegations are true or not. The general rule is that a party must assert any affirmative defenses that they may have in either a preanswer motion or in their answer. Failure to assert these defenses in either the preanswer motion or answer results in waiver of the defense. Thus, Al and Clara, because the facts do not indicate that they raised the defense in a preanswer motion, must assert the statute of limitations defense in their answer if they are to preserve the defense in the case.

2. Al is allowed, though not required, to bring a counterclaim against Bob and Clara to enforce the real estate sale and escrow contract. At issue is whether Al's counterclaim would be compulsory. IN general, a party may freely join any counterclaim or cross-claim that he or she has against any existing party, regardless of whether they arise out of the same transaction or occurrence. This is a permissive counterclaim. However, in Missouri, if the counterclaim/cross-claim is compulsory, it must be brought in the instant suit or it will be barred. A counterclaim is compulsory if it arises out of the same transaction or occurrence. In this case, Al's counterclaim/cross-claim does not arise out of the same transaction or occurrence. Bob's suit is for trespass to his land when Al went and took timber from the land without Bob's permission. Al's counterclaim, however, would be a suit to specifically enforce the sale of the land and the escrow agreement. The land sale and escrow contracts and Bob's trespass action do not arise out of the same transaction or occurence (though an argument can be made that they do because Bob is refusing to sell the land because of Al's trespass). Because the counterclaim/cross-claim is not likely compulsory, Al *can* bring the claim in the instant lawsuit, but need not if he chooses not to.

Because it is not likely compulsory, his claim will not be barred in a subsequent suit, and he can seek to enforce the real estate and escrow contracts in an independent and separate action filed late. (If, on the other hand, the Court finds that Al's counterclaim/cross-claim is compulsory, he *must* bring it in the instant suit. Failure to do so will result in him being barred from bringing the claim in an independent and separate action filed later).

3. Clara can file an interpleader action as a counterclaim/cross-claim. At issue is the procedural recourse available to a person who may be subject to inconsistent obligations. A party may file an action for interpleader when there are multiple claimants, each claiming an interest in some property, which may lead the person filing intervention to face inconsistent obligations. Interpleader is available not only as a separate independent action, but also as a counterclaim/cross-claim. Thus, Clara can, as a counterclaim or cross-claim, assert interpleader, making the Court determine to whom she is to give the money and to whom she is to give the deed. WIth both rival claimants before the Court, Clara will not be exposed to inconsistent obligations.

7-03 MO Essay 3 - Example 2

1. In order to assert the statute of limitations defense, it must be raised as an affirmative defense in a pre-answer motion or within the answer. Missouri is a fact-pleading state, so they must allege the ultimate facts leading to application of the statute of limitations. This includes when it began to run, what the applicable statute is, and that no tolling occurred.

Clara would also want to file an affirmative defense that she is in no way liable because she was not involved in the trespass or under a duty to stop it.

Failure to raise these issues will waive them.

2. Al Trespasser would probably be permitted to bring that action as a counterclaim or cross claim, but need not do so in order to preserve his right to bring that action.

A defendant must bring all claims arising out of the same act transaction, or series of transactions against a plaintiff or be deemed to waive them. This is termed a compulsory counterclaim.

In this case, the trespass and the sales contract are wholly separate acts & transactions, so are not compulsory. Rather it would be a permissive counterclaim which the judge may permit in the interests of justice, but failure to assert will not waive the right to bring in a later action.

As to a cross claim against Clara, based on the same reasoning, Al Trespasser need not file the cross claim against Clara on this action. He can bring, a separate action to enforce the land sales contract & escrow agreement against Bob & Clara respectively.

Thus, by not bringing the cross claim or counterclaim, Al is not barred from bringing a separate action to enforce the land sales contract & escrow agreement.

3. Clara can bring an interpleader action, interpleading both Al and Bob.

An interpleader action is permitted where the holder of a common fund wishes to leave it to the court and to the parties to determine which party has a right to the common fund. This is most often done where an insurance company admits liability to a claim, but there are 2 rival claimants.

In this case, Clara holds $80,000 and deed to land involved. She really does not care which goes to which rival claimant, Al or Bob, just that she is not liable for giving the wrong person land or money. Thus, by interpleading both Al & Bob, she can turn both land & money to the court & have Bob & Al fight it out.

By interpleading Bob & Al, Clara can stay out of the fight & leave it to the court to determine who gets title to the land & who gets the money representing the purchase price.

7-03 MO Essay 3 - Example 3

1. There are several things which Al Trespasser and Clara Escrow need to include in their separate answers to preserve all of their defenses. Al and Clara need to include certain motions are their defenses will be waived. They must include motions for improper service, improper venue, or lack of personal jurisdiction. If either defendant can make a colorful argument with respect to these, they must raise them before answering or they will be deemed to have been waived. Also, they must make a motion for a more definite statement at this time or it will also be waived.

Both defendants, must answer the claims with particular facts admitting or denying with facts because Missouri is a fact pleading state.

Also, they must raise the statute of limitations as a defense in their answers if they plan on using it because it is an affirmative avoidance defense, which must be alleged with particularity.

2. Al Trespasser is allowed to bring a counterclaim or cross claim against Bob and Clara to enforce the real estate sale and escrow contracts. In Missouri, the law is that any claim may be brought against an opposing party or fellow party, whether or not that claim arises out of the same set of transactions or occurrences. This is known as permissive joinder of claims and may be freely exercised in Missouri.

If Al Trespasser does not bring an action to enforce the sale and escrow, he will still have the right to do so in an independent and separate action filed later because this claim is not subject to compulsory joinder.

In Missouri, a counterclaim must be brought in the same action if it arises out of the same transaction or occurrence. If not brought, it will be barred in any future action. In this case, the sale and escrow do not arise from the same transaction or occurrence as the trespass. Therefore, they will not be later barred by the doctrine of compulsory joinder.

3. Clara Escrow has the procedural recourse known as interpleader available to her with respect to the dispute between Al Trespasser and Bob Landowner. The device of interpleader in Missouri allows the holder of a common fund who has no claim of her own to the fund to join any parties who may have a claim in the fund in a single suit to determine ownership of the fund. This protects the holder from multiple liability.

Here, Clara should join Trespasser and Landowner in an interpleader action where the court will decide who takes the deed and the $80,000. This will protect Escrow from possible liability to each party.

7-03 MO Essay 4 - Example 1

1. The court is likely to grant Doctor's Group ("DG") some injunctive relief that they request, though maybe not to the full extent of the covenant not to compete. The main issue here is the enforceability of the covenant in Physician's contract.

Generally, reasonably drawn covenants not to compete are enforceable in Missouri. In analyzing whether such a covenant, the court will look to whether three separate factors are reasonable: The duration of the covenant, the geographical area of the covenant, and the general scope of the covenant. In this case, the geographical area is likely ok, but the other areas may be too expansive. 75 miles is not unreasonable, patients come from a five state radius. However, 24 months may be construed as too long, as courts may frown on covenants that last longer than a year. Further, the scope is too broad as Physician may not render any "professional" services. Surely, if physician were also a lawyer he could render these services and not compete with DG.

Even though the covenant is overbroad, a Missouri Court may "blue pencil" the agreement and enforce it. To the extent that parties made a good faith effort to draft a reasonable covenant not to compete, Missouri Courts, unlike others, have been prone to essentially re-write the agreement such that it is reasonable, an activity called "blue penciling." Here, the court may find a good faith effort to create a covenant, and then enforce it to its reasonable extent, perhaps reducing it in scope and duration.

2. To the extent that Physician referred patients to his practice while he was employed by DG, DG may get an injunction regarding their treatment on a trade secret theory, either based on breach of Fiduciary duty or usurpation of trade secrets, or unfair competition.

A trade secret is generally any information acquired by a company that isn't generally available to the public that gives its possessor an advantage over the competition. In this case, any patient lists that Physician may have made or taken with him could be construed as trade secrets. Thus, the court could infer that Physician had a fiduciary duty not to benefit from the information he acquired while working for DG. If this were the case, then the court could enjoin Physician from using the secrets that he usurped.

Perhaps an even better argument is based on the concept of unfair competition. Again, a court could find a fiduciary duty between Physician and DG, and based on the employment relationship and this duty, Physician owed DG a duty not to compete with them while he was employed. Thus, the court could enjoin his activity to the extent he breached that duty by recruiting clients while he worked for DG, and prevent him from seeing those clients in the future. The factors the court will look at are the relationship of Physician to DG as employer/employee, and the extent to which he unfairly benefitted during the course of his employment.

4. The existence of these facts may allow Physician to raise the equitable defense of unclean hands. If this is proven, the court may refuse to enforce the contract against Physician sinced it was breached by DG.

One of the major equitable defenses is the doctrine of unclean hands. When a person seeking an injunction has themselves engaged in illegal or wrongful activity, a court will be reluctant to issue an injunction in their favor because they have come to court with unclean hands. In this case, DG themselves have arguably breached the contract, the very contract that they seek to enforce against

Physician. Thus, a court will be reluctant to give them an injunction based on this activity. If proven, the court will probably not grant the injunction because to enforce a contract against Physician that has been breached by DG would be inequitable.

7-03 MO Essay 4 - Example 2

1. The trial court is not likely to grant an injunction prohibiting Paul from engaging in practice within 75 miles of the Doctor's Group because Paul has not engaged in any activity causing the need for such an injunction.

An injunction is an equitable remedy the court imposes when it has personal jurisdiction over the defendant, the plaintiff does not have an adequate remedy at law, the plaintiff has suffered injury in fact, and the injunction would adequately made the plaintiff whole and will not cause undue hardship to the defendant. In this case the Doctor's Group does not have standing to request this injunction because they have not suffered injury due to the activity the injunction seeks to prohibit. Paul's practice is 100 miles away – outside the 75 mile radius they seek to enforce.

2. If the court finds the employment contract enforceable – or least the pertinent part of the contract – the court is likely to issue the requested injunction.

The court will consider whether it has personal jurisdiction over Paul. Injunctions are generally enforced with contempt – if the court cannot enforce the injunction it will not issue one.

The court will consider whether the Doctor's Group has an adequate remedy at law, i.e. damages. In this case, damages would not make the Plaintiff whole because they would be difficult to ascertain. The court will consider whether the plaintiffs have suffered actual injury due to the conduct they seek to prevent – in this case, they clearly have – Paul is not only seeing their patients, he has actively appropriated the patients.

Th court will consider whether the injunction would make Plaintiff whole – and it would in this case because it would stop Paul from misappropriating their patients. Lastly, the court would consider whether the injunction would cause undue hardship to Paul. Because injunction is an equitable remedy the court must perform a balancing test. The injunction does threaten Paul's livelihood and, because of the Doctor's Groups' extensive practice, it would preclude Paul from doing a lot of business. The court will also consider the unfairness to third parties – the injunction will limit patients' of the Doctor's Group's choice of physicians.

The court could go either way – for or against the injunction – it is a close call, but the court will probably grant the injunction.

3. The fact would probably make a difference in the court's analysis. Because injunction is an equitable remedy the requesting party cannot have unclean hands. Thus, the Doctor's Groups' breach may preclude them from seeking relief because it was their misconduct that set the defendant's misconduct in motion.

7-03 MO Essay 4 - Example 3

1. The threshold equity question: is the remedy feasible and is there no adequate remedy at law must first be decided. In this case remedy is feasible because the court has jurisdiction over Paul and no adequate remedy because damages speculative.

The court is likely to grant injunctive relief by "blue penciling" the contract. Under Missouri law, a covenant not to compete is enforceable if it is reasonable as to the duration of the contract and the location specified. Furthermore, the restrictions within the contract must be limited to the extent that they will protect the employer from competition. Missouri courts will "blue pencil" a covenant not to compete so that it fulfills the above requirements under Missouri law by rewriting provisions to decrease their scope. In this case, 2 years and 75 miles both appear to be too broad in scope and the general restrictions listed in section 3 of the contract such as "no services of a professional nature" are overly broad to protect the employer's interest. Nevertheless, an agreement not to compete is appropriate in this situation and the deficiencies of the document are not such that a Missouri court would refuse to blue pencil it. Thus, the court would use its power to blue pencil the contract not to compete to make it comply with Missouri law and would then enforce it.

The court would look not only to the factors above but also public policy (competition is good). However it would reach the same result above. It would also look to the validity of the contract and the adequacy of consideration.

2. The court is likely to grant injunctive relief to the Doctors' Group. Equity can issue an injunction for using trade secrets of an employer or interfering with someone's dealings with customers and other unfair competition. A trade secret is anything not otherwise available to the public that gives its possessor a competitive advantage. In this case, the patient's names and addresses/contact info could be considered a trade secret. Paul Physician's referral of his patients at the Doctor's Group to his own private practice would constitute unfair competition and possibly a breach of his duty of loyalty as an agent of the Doctors' Group. Also because these were formerly patients of the Doctors' Group and Paul Physician is inducing them not to deal with the Doctors' Group – this can be seen as interfering with business.

The court would look at public policy, fairness principles, and whether either party would suffer undue hardship. Also, in order to use any equitable remedies (this applies to question 1 as well) a party must show the remedy is feasible and that there is no adequate remedy at law. Since the court has proper jurisdiction over Paul Physician and damages for lost profits due to unfair competition are speculative – equitable remedies are appropriate in this case. The court would likely use a negative injunction to prevent Paul Physician from seeing those patients he "stole" from the Doctors' Group.

Negative injunction = prevents an action.

3. This fact, if proven at trial would make a difference in the court's analysis of whether or not to grant injunctive relief. Under Missouri law, unclean hands is a defense to an action in equity. Unclean hands is any activity that offends the court that is proximately related to the underlying action in equity. Also, in order to seek specific performance of a covenant not to compete – or issue an injunction based on a contract theory, the underlying contract must be valid. If the Doctors' Group had already breached their contract they would not be able to hold Paul Physician to the contract. The Doctors' Group not paying Paul Physician the agreed amount could also be seen as giving them unclean hands since they are

expecting Paul to comply with an agreement that they are not in compliance with. Accordingly, this fact would make a difference in the court's analysis of whether or not to grant injunctive relief.